



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

A GREAT JUDICIAL CHARACTER, ROGER BROOKE TANEY ¹

The history of the Judiciary of a country ought to be as instructive as that of its sovereigns or its soldiers, and yet it is slighted by the ordinary chronicler who finds the back stair gossip of the palace or the blare and jingle of the camp more engaging to his pen than the sober story of the high but sometimes frigid development of Justice and its administration. For us American Lawyers in one hundred and thirty-two years of national existence, its course is illustrated and its needs and achievements personified in the seven men who have held and administered the great office of Chief Justice of the Supreme Court of the United States, omitting those titular holders of the office who took no substantial part in its administration, like Rutledge who failed of confirmation on account of loss of reason which was deemed to incapacitate him.

First in the honorable procession comes John Jay of New York, of Huguenot blood, who at thirty years of age was serving the revolutionists as a member of the committee of correspondence with the European friends of American Liberty, especially in the negotiations with France; later, resigning from the Continental Congress to serve in that of his province of New York. He was two years minister to Spain. With Franklin and Adams later he successfully negotiated peace with Great Britain. Five years he was Secretary for Foreign Affairs and then was appointed by Washington the first Chief Justice of the Supreme Court of the United States in 1789. Three years later he was sent as our representative to England and negotiated the unpopular Jay treaty. He retired from the Chief Justiceship to accept the Governorship of New York, a second time preferring local to national service and honor, held that office six years, and, declining a second appointment to the Chief Justiceship offered by Adams, he withdrew from public life to his ancestral estate, and for twenty-five years devoted himself to good works, long serving as president of the Society for Promoting the Emancipation of Slaves, and accomplishing that great good in the State of New York.

Jay was an extreme federalist, and in a letter to Washington,

¹ An address delivered before the Bar of Wisconsin at its annual meeting at Milwaukee, July 1st, 1908.

just prior to the constitutional convention, as to the powers to be granted to the national government wrote, "I think the more the better; the states retaining only so much as may be necessary for domestic purposes, and all their principal officers, civil and military, being commissioned and removable by the national government," a sentiment which did not dominate the convention, but which might not be displeasing to the present Chief Executive.

The next of the Chief Justices was Oliver Ellsworth, a lawyer of Hartford, Connecticut, a delegate to the convention which framed our constitution and a leader in the Connecticut convention which ratified it; then the federal leader in the Senate of the United States, chairman of the committee for organizing the federal judiciary, and draftsman of the measure which was adopted. In 1796 Washington appointed him Jay's successor as Chief Justice, but after short service he resigned and returned to Connecticut to serve in her State Council until his death.

Then came John Marshall of Virginia, our great constructive jurist, marching to his great place through service in the Army of the Revolution, through the legislative and constitutional conventions of Virginia, through service as envoy to France, through the federal House of Representatives and the secretarships of War and of State. In 1801 Adams nominated him Chief Justice and the senate confirmed the nomination without one dissent. For thirty-four years he presided over the court with great and reasonable wisdom, molding the new constitution so as to make government feasible and finding by implication all necessary powers in that fundamental document. In 1835 full of years and honors he died, and was laid by his dear wife in the old burying ground at Richmond under that gray stone recalled by some of us which bears only his name and date and which needs no other epitaph and could record no higher eulogy.

Andrew Jackson was in the second term of his administration which had not been particularly placid. Marshall's death occurred at Philadelphia July 6, 1835, and on December 28 Jackson sent to the Senate the nomination of Roger B. Taney to be his successor.

It is the career of that eminent man who continued to preside over our highest court until his death October 12, 1864, a period almost as extended as that of Marshall and involving the term of the acute agitation against slavery and the larger part of the Civil War, which I wish to review somewhat more fully, thinking that the bearing of at least one of his judicial decisions upon the

affairs of this state of Wisconsin, and incidents now historic in the City of Milwaukee, lends especial interest to his name in this community.

Roger Brooke Taney was born March 17, 1777, in Calvert County, Maryland. His father, Michael Taney was a planter and slave owner of good estate. The family was of the Roman Catholic faith, and, as under the severe English penal laws then of force in Maryland, persons of that faith were prohibited from teaching school, and as in the Protestant schools the Roman Catholic children found their religion assailed and themselves humiliated and insulted, according to the custom of the well to do, Michael Taney was educated at the English Jesuit College at St. Omer in France and at Bruges. Michael married a daughter of Roger Brooke, a large landowner, a good and gentle woman but of little education, who always interceded for the slaves and sought to relieve all distress, and her son writing in extreme age said, "I remember and feel the effect of her teaching to this hour." One of the blessed fruits of the revolution was that it removed the unjust restrictions upon education on account of religious belief, and the new constitution of Maryland put all professing Christians on an equal footing. But the nearest school was kept in a log cabin three miles away, and assumed only to teach the three elementary subjects, and arithmetic no further than to the rule of three.

Thither at the age of eight the lad was sent, walking to and fro in fine and staying at home in bad weather.

The only books the teacher had ever read were Dillworth's spelling book and the Bible. In due course Roger was advanced to a little grammar school ten miles away, where the twenty pupils boarded in the house of a Scotch master who presently became demented and drowned himself.

Then private tutors during three years prepared him for college and when a little over fifteen he entered Dickinson College, Carlisle. It was a serious journey for those days. He embarked on a schooner in the river Patuxent and was delayed by unfavorable winds a week, and when he arrived at Baltimore, as there was no stage to Carlisle, he had to wait for a returning wagon, but finally at the end of two weeks he reached his destination. The students had to take in specie money to pay their expenses till their return. At Carlisle he took his bachelor's degree in Arts in 1795, having spent much of his time, according to the approved

custom of the day, in copying compendiums of the various sciences in the form of questions and answers. The vice-principal had written a rhyming geography of which he was vain, which all were compelled to buy and commit to memory, but the vice-principal does not seem to have commanded the regard of his students thereby.

Taney's classmates chose him, after an animated contest, to be the valedictorian, the first of many honors, and he records that his oration cost him much trouble and anxiety, and that his greatest difficulty was how to begin. He says he was frightened, trembled in every limb, and his voice was husky and unmanageable. After graduating he went home and spent a fox hunting winter with his father, who kept a pack of hounds and an open house. He was soon tired of this, and in the spring entered the office of a Judge Chase at Annapolis, and read law, often twelve hours a day (though he truly says it would have been better to have read four or five hours only). The first session of the general court made a great impression on the future Chief Justice. The three judges in scarlet cloaks sat in elevated chairs and at the bar he heard men "whose names are still eminent in our profession," such as Luther Martin, John Barton Key, and John Thompson Mason, and later Mr. Pinckney. He has left us graphic pictures of them all, and tells us how Pinckney, the studied rhetorician, the polished gentleman and *élégant*, who at the age of fifty "spoke with gloves on nice enough to wear in a ball room." Pinckney, whom, notwithstanding his "amber colored doeskin gloves," Marshall declared "the greatest man he had ever seen in a Court of Justice," utterly routed, overcame and supplanted Luther Martin, the coarse, drunken, vigorous but improvident vulgarian who had so long dominated the bar of Maryland.

After three years of law studies Taney came to the bar in 1799. He had, by practice in a little students' debating society, overcome much of the embarrassment in speaking which had so nearly wrecked his valedictory. His first case was the defense of a man indicted in the Mayor's Court of Annapolis for assault and battery. He took no notes, for his hand shook too much, his knees trembled so he was obliged to press his legs against the table to keep steady on his feet, but he watched the evidence closely, made a pretty good argument, though in a tremulous and discordant

voice, and he won a verdict for his client. So came his first professional success.

He returned to his native county and at twenty-two, after sitting four days at the hustings where each candidate solicited every voter, in the midst of a play of rough wit, the voters voting *viva voce*, he was elected to the House of Delegates, his first political success. From that time on, he became an active supporter of the Federalist party. In 1801 Taney removed to Frederick, and in five years had so prospered that he could think of marriage. In 1806 he was married to a sister of Frances Scott Key, later the author of "The Star Spangled Banner," and this happy alliance we may consider his first great social achievement.

In 1811 General Wilkinson, Commander-in-Chief of the United States Army, suspected as an accomplice of Aaron Burr, was tried on a series of charges before a Military Court at Frederick. Wilkinson had turned state's evidence against Burr, and his cause was deeply unpopular, but he was acquitted, and his sword returned to him, and in his defense Taney won a professional triumph of national interest.

In 1815 Mr. Taney was elected and served a term of five years in the State Senate, the Senate of Maryland then consisting of fifteen members chosen by a college of electors. In 1819 a Methodist minister named Gruber from Pennsylvania, at a camp meeting in Washington, Maryland, very powerfully denounced human slavery. For this he was indicted as intending to incite insurrection, and the disturbance of the peace, and the case aroused deep local feeling. Mr. Taney appeared in his defense, and his tempered yet able and fearless argument is preserved, and it was effective. There was a verdict of not guilty.

Death and change come to our profession as to all the sons of Adam.

Senator Pinckney died in 1823, Luther Martin as a result of years of indulgence became a mental wreck, and yet such was the hold of the fallen giant that the legislature of Maryland by statute required all lawyers of the state to pay an annual license fee of \$5.00, and applied the proceeds to the use of Luther Martin. Others fell away and there were opportunities for a rising man. So in 1823 Taney removed to Baltimore, and quickly took his place as the head of that important bar and was retained as counsel in every important case. Monroe's second

term was expiring and Adams, Clay, Crawford and Jackson aspired to the succession.

To promote Jackson's cause his correspondence with Munroe was published, in which he intimated that if he had commanded the military department where the Hartford Convention met, if it had been the last act of his life, he would have had the three principal leaders condemned by court-martial, and punished as monarchists and traitors. Yet he declared a very favorable opinion of certain honest and virtuous Federalists.

These characteristics declarations of General Jackson brought to his support many Maryland Federalists, and among them Taney. Maryland, so recently invaded and assaulted by the British forces, could not forgive the disloyal conduct of the Hartford politicians.

With William Wirt, Taney appeared for the State of Maryland in the Supreme Court of the United States in a successful litigation as to Lord Baltimore's rights, and shortly after on the unanimous recommendation of the Baltimore bar, was appointed Attorney-General of Maryland. It was the one office, he said, he ever desired to hold.

Jackson became president March 4, 1829, and owing to difficulties between themselves, all the members of the cabinet resigned. So many of the public men aspired to succeed Jackson that it was difficult to choose a safe or docile cabinet, as necessary in that as in the present time.

Dr. William Jones of Washington, an old Maryland friend, told Jackson, "I know a man who will suit for attorney-general." "Who is he?" said the General. "Roger B. Taney, of the Baltimore bar. He is now the leading lawyer of Maryland, and a zealous friend of your administration." "He was a Federalist, but after war was declared in 1812, gave it his hearty support." So the matter was broached. Taney's brother-in-law, F. S. Key, took it up and in June, 1831, the appointment was made, and three days later accepted. This was the first federal office held by Taney.

The charter of the Bank of the United States was to expire in 1836, and it sought a renewal. Jackson assailed the constitutionality of the act granting the charter, and declared the bank a failure "in the great end of establishing a uniform and sound currency." Agitation for and against the renewal was widespread and virulent. In 1832 Congress passed a bill for the

renewal of the charter, and sent it to the president for his approval. Taney had already given the president in writing his reasons why the bill should, if passed, be vetoed. He now helped him prepare his message, which vetoed the measure, but Taney alone of the cabinet favored the veto. General Jackson appealed to the country for reelection on his decentralizing policy, in which his war on the bank was a chief element. The bank, with its enormous financial power and all its friends, the rival party and its brilliant leaders, threw themselves into the contest which has been described as "fierce, malignant and desperate." Mr. Clay of Kentucky, the mill boy of the slashes, was overwhelmingly defeated. General Jackson of Tennessee, Old Hickory, with his Attorney-General as his chief supporter, won a famous victory.

The Bank of the United States was generally believed to be amply solvent, but Jackson reached a different conclusion which was fully shared by Taney. They believed it risking bankruptcy, and that the federal deposits were in danger.

The president startled the country by a message asking a congressional investigation and intimating that it was "no longer a safe depository of the money of the people." The House of Representatives acted unfavorably on the recommendations, many of the members being borrowers from the bank.

Taney's biographer, Dr. Samuel Tyler, claims for him the chief part "in the contest with the money power," and my friend, Prof. F. J. Turner, from an examination of much, yet unprinted, correspondence confirms this belief.

Jackson was out of the city in August, 1833, when Taney wrote him to advise that "the deposits ought to be removed by order of the executive." The letter is couched in terms most flattering, persuasive and deferential, assuring Jackson of his support should the removal be made, yet intimating that Jackson's services to the nation already exceed those of any other, and it was too much to ask him to undertake this new and arduous encounter.

Duane, Secretary of the Treasury, opposed the plan and was removed, and the same day Taney was appointed to his place. He assumed the duties of the treasury the succeeding day and two days later ordered the gradual removal of the deposits, and their deposit in State banks. The bank, as was natural, was compelled to call in its immense and widespread loans and discounts, and a financial convulsion swept the country with ruin and dismay. The rich were impoverished, and the poor left to starve. Property

had no value and labor no employment. Friends and enemies of the bank shared the common ruin and went down to disaster together. Congress met, and the session is called the panic session. Jackson stood firm and Taney addressed a letter to the speaker showing the lawfulness and expediency of the removal. The Senate under the lead of Clay passed hostile resolutions, but the House, fresh from the people, supported the administration.

The bank was ruined, its head, Nicholas Biddle, indicted, and the nomination of Mr. Taney being finally sent to the Senate was promptly rejected, being the first cabinet nomination ever so dealt with.

He resigned at once, and returned to his practice at Baltimore, being received with a cavalcade of horsemen, a public dinner in the Court House Square and every mark of honor.

Webster denounced Taney as "a pliant instrument of the President," and Taney rather successfully replied that it was well known that Webster had found the bank a profitable client, and that there were grounds for believing him the bank's "pliant instrument" to do its bidding whenever required.

Judge Duvall resigned from the Federal Supreme Bench in January, 1835, and Jackson nominated Mr. Taney to succeed him. Marshall, his political opponent, with his usual generosity, sought to secure his confirmation, but the Senate indefinitely postponed it. A few months later, Marshall, that great and good man, died, and December 28, 1835, Jackson named Taney to succeed him. Clay and Webster led the opposition, but the nomination was shortly confirmed by a majority of fourteen votes, the membership of the Senate having changed since his recent rejection.

From that time until his death, October 12, 1864, he held that greatest of all judicial stations in this and perhaps in any nation. The place of Lord Chief Justice of England is inferior in rank, income and dignity to that of Lord Chancellor, and the Chancellor as speaker of the House of Lords and an active member of the government, controlling its judicial patronage, going out of office with his party, is (although a great judicial, still more) a great political officer.

It is claimed with justice that Taney's services to General Jackson in removing the bank deposits were the cause of his appointment, but it is answered that Marshall's splendid defense of Adams in the case of Jonathan Robbins, claiming to be an American but delivered to the British Government and hung to

the yardarm as a deserter, was equally the cause of Marshall's appointment.

The men were fit, that was the main point, though the offices were bestowed on each one as a political reward.

Chief Justice Taney's equipment consisted not only in great legal learning, the result of years of active practice and unremitting industry, but also an extraordinary familiarity with the practice of all kinds of courts. In appeals from jurisdictions of every variety, this helped the court greatly to understand and duly consider the procedure below.

His influence is thought to have brought about a reaction from Marshall's later decisions, and a return to the stricter construction of the Constitution. Oliver Wolcott in a letter to Fisher Ames objected to Marshall on the theory that he would "expound the Constitution as if it were a penal statute," but the event was wholly otherwise, and the criticism would perhaps more nearly fit the decisions of Taney. Two controlling predilections color and control many of his constitutional decisions, both native to his time and locality. First, a strong belief in States' rights, and secondly, in negro slavery. He soon held with a majority of his court that New York State under its police power had a right to impose conditions on shipmasters arriving in its ports, overriding earlier cases which looked the other way. In the same way he sustained, as a sovereign act, a statute of Kentucky establishing a bank which was claimed to be repugnant to the clause of the Federal Constitution restraining states from emitting bills of credit. Marshall and a majority of the court had decided this case the other way but a reargument was ordered and the opposite conclusion reached under Taney's lead.

In the great Charles River Bridge case he held public grants were to be strictly construed, and that the bridge company had no exclusive privilege since none such was expressly given, a far reaching and most wholesome decision, and that a grant of like franchise to another bridge company did not therefore impair the obligation of a contract. The opposite theory, which Story sustained in his dissent, would have delayed and hampered improvement and frustrated public convenience infinitely. Story, however, was so disheartened by this decision that he was with difficulty persuaded not to resign, believing, with unnecessary despondence, what many have believed before and since, that all constitutional doctrines were fast fading away.

Rhode Island brought a suit in equity against Massachusetts to establish their boundary line. The court sustained the Federal jurisdiction, but Taney dissented, refusing to agree to this coercion of a sovereign State.

Prigg, an agent of her owner, carried off a negro woman from Pennsylvania and returned her to her master. He was prosecuted under a state statute making it felony to carry a negro by force out of the state. The court held the statute unconstitutional, Story writing the opinion, and Taney concurred in the result, but dissented from the doctrine that a state could not pass laws to aid in giving effect to constitutional provisions. He regarded the union of the states as international in its character, and this strongly colored his judicial views. Subsequent events have certainly decided in favor of a closer bond between the states. We cannot review this long line of decisions in which he was the master spirit, but a great controversy was to be presented, affecting profoundly human rights, and the Chief Justice was to sustain the side which triumphed temporarily and lost eternally.

President Buchanan in his inaugural address, seeking to calm the rising storm as to slavery in the territories, announced that a case was pending in the Supreme Court involving the constitutional right, and that he should abide by the decision.

The case was one of the most momentous ever decided by a Court of Justice, that of *Dred Scott vs. Sandford* (19 Howard 393, 1856).

Dred Scott brought an action for his freedom in the Circuit Court for St. Louis County, Missouri, which was appealed to the State Supreme Court, and finally carried by writ of error to the Supreme Court of the United States. Scott's declaration alleged that Sandford had assaulted him, Harriet Scott, his wife, and Eliza Scott and Lizzie Scott, his two children. Sandford set up that "plaintiff was a negro slave, the lawful property of him, the defendant, and as such, the defendant gently laid his hands upon him," and restrained him as he had a right, and interposed like pleas as to the wife and children. The facts were agreed that plaintiff had been a negro slave belonging to Dr. Emerson, a surgeon in the army. That Emerson in 1834 took him from Missouri to Rock Island and later to Fort Snelling in the Louisiana territory. That Harriet was the slave of a major in the army who took her also to Fort Snelling, and sold her to Emerson. That *Dred* and *Eliza* were married in 1836 at Fort Snelling and the children were

born of that marriage. That in 1836 Emerson removed them all to Missouri, and that he as their owner imprisoned them.

The claim was that having been taken by their master into territory where, by act of Congress, slavery was forbidden, they became free and being once free that they continued free when taken back into slave territory.

The majority of the Court, Taney giving the principal opinion, held:

A free negro of African race, whose ancestors were brought to this country and sold as slaves, is not a citizen within the meaning of the constitution of the United States, and therefore could not sue as such.

That the Constitution points to this race as one it was moral to deal in as articles of property.

That no state can give the rights of citizenship of the United States.

That the Constitution must be construed as understood when adopted.

That plaintiff, therefore, since he admitted the above facts by his own admissions had no character as a citizen, and no right to sue in the Circuit Court.

That as to the claim that he and his family became entitled to freedom on being taken by their owner to reside in a territory where slavery was forbidden by act of Congress, and that on their return free to Missouri they become citizens, it was held neither freedom nor citizenship resulted.

That Congress can exercise no power over the rights of persons or property of a citizen of the territory which is prohibited by the Constitution.

That a citizen may take with him into the territory any article of property which the Constitution recognizes as such.

That slaves are so recognized and the federal government is pledged to protect such property.

That the act of Congress is therefore not warranted.

That by the law of Missouri, a slave gets no freedom by being taken to reside in a free state if he comes again into Missouri.

Justices McLean and Curtis filed strong dissenting opinions. In the opinion of the Chief Justice occurred the passage concerning the negroes so often referred to with opprobrium. He says, speaking of the negro race, "They had for more than a century before been regarded as beings of an inferior order (p. 407), and

altogether unfit to associate with the white races either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."

Taney's biographer says, "The decision excited more rancorous hate than any other judgment of a court since man first submitted disputes to the arbitrament of law," and this was the especial ground of bitter opposition to a bill to provide in 1865 after his death for a bust of Taney in the Supreme Court room, when Charles Sumner in the Senate declared the name of Taney was "to be hooted down the page of history," and Sumner was supported by Wade and Wilson.

One may accord to Taney's opinion logic and learning, but one cannot concede to it an enlightened and forward looking spirit. He was seventy-nine years old when he wrote this opinion, and that he should seek to crystalize the views of the past, rather than the feeling of the present or the conviction of the future, was natural to his age and his origin. At a like age we will be equally incapable of changing our views as to the ownership in horses and cattle if the world, in its advance, ever recognizes, as I sometimes hope it will, their inalienable rights.

Two years later came the case of *Ableman vs. Booth* (21 Howard 506, 1858), in which Taney rendered what he later declared one of his most satisfactory opinions.

Carl Schurz in his recent autobiography tells of the "intense commotion" created among the people, when Joshua Glover, for some time working in a saw mill near Racine, was arrested as a fugitive slave from Missouri. At dusk, as he sat in his cabin, his day's work done, two deputy marshalls with four assistants and the owner from Missouri, knocked at the humble door. It was opened and instantly Glover was struck down with a bludgeon. He struggled fiercely, but was overcome by the seven men, manacled, wounded and bleeding, he was thrust into a wagon, carried to Milwaukee and locked in the jail.

The people of Racine, as soon as it was known, "rushed together on the court house square—the largest concourse ever seen in that town—denouncing the kidnapping of Joshua Glover, a faithful laborer and an honest man," and "demanding for him a fair and impartial trial by jury." A demand having in it some suggestion of the demand of labor to-day to be tried by jury and not by injunction. They denounced the slave catching law of 1850 as disgraceful and declared it repealed. Sherman M. Booth mounted

a horse and riding through the streets of Milwaukee stopped at every corner, loudly shouting, "Freemen, to the rescue. Slave catchers are in our midst! Be at the court house at two o'clock."

More than five thousand men and women assembled, some of the foremost citizens addressed them, a committee of vigilance and protection was named, which discountenanced any violation of law. But when the delegation from Racine arrived, the multitude battered down the jail door and bore away the rescued slave to Canada and Freedom, he lifting his manacled hands as he went and shouting "Glory Hallalujah." The Milwaukee Sentinel regretted a breach of law, but said, "Neither law nor jail will stand against the people when they think their sacred rights are involved."

See also article by Vroman Mason on "The Fugitive Slave Law in Wisconsin," Proceedings of Wisconsin State Historical Society for 1895, p. 124.

Booth was charged before Winfield Smith, United States Court Commissioner, with aiding and abetting the escape of a fugitive slave from a deputy marshal who held him under a warrant issued by the Federal District Judge. On this charge the Commissioner held Booth to bail for trial and on failure to obtain bail remanded him to the custody of the marshal. Justice A. D. Smith of the Supreme Court of Wisconsin issued a writ of *habeas corpus* to the marshal, and, on hearing, held the detention illegal and ordered the marshal to discharge him, which was done. Later the marshal on certiorari sought to have this action reversed, but the Supreme Court of Wisconsin affirmed the action of Mr. Justice Smith, and gave costs against the marshal.

On writ of error to the Federal Supreme Court, that court, per Taney, C. J., held the proceedings in the state court without authority, and that the marshal should disregard its process. That the fugitive slave act was constitutional in all its provisions, and the judgment of the Wisconsin Court was reversed.

The Legislature of Wisconsin by joint resolution denounced the federal decision, and declared a defiance by the states of such "unauthorized acts" done under color of the Constitution to be "the rightful remedy."

The answer of the country to this clamor and controversy, of which the above was but an incident, was the election of Abraham Lincoln, and in 1861 the great Civil War. Moral issues cannot be neatly disposed of by the logic even of a court of last resort.

They are settled by the strong feeling and conviction of the time, not that of one century or two centuries or ten centuries before. Such remedies by judgment or decree are what Richard Grant White used to call "court plaster for a cancer."

Mr. Lincoln in his inaugural while speaking of the respect due the decisions of the Supreme Court said, "that if the policy of the Government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal," an observation worthy to excite most serious reflection then, and not to be ignored now. The comparatively modern practice of dealing with many of the recent controversies in proceedings instituted by the Attorney-General at the command of the President and so controlled by the Government, seems now to modify one difficulty which Mr. Lincoln noted.

Notwithstanding Taney's opinion as to slavery, yet his regard for State rights constrained him in the case of *Kentucky vs. Ohio* (24 Howard 66) in 1860, speaking for the court, to refuse a mandamus to compel the Governor of Ohio to surrender Lago, a free man of color, a fugitive from justice who had been guilty in Kentucky of assisting a slave to escape.

In 1861 John Merryman of Maryland was arrested under a military order on a charge of treason, and confined in Fort McHenry. Chief Justice Taney issued a writ of *habeas corpus*, and on General Cadwalader refusing compliance, he issued an attachment against him for contempt, but the marshal who sought to serve it was denied admission to the Fort. Taney said the marshal could summon to his aid the *posse comitatus* but excused the exercise of this power, on account of its inadequacy, and filed his opinion condemning the suspending of the writ of *habeas corpus*, and directed a copy of all the proceedings sent to the President, but Mr. Lincoln paid no attention as Taney's biographer says, "to the opinion of that great magistrate."

Taney himself anticipated imprisonment in the same fortress but at eighty-four years of age took the burden of what he deemed his duty, and for this he suffered nothing at the hands of that large man who then bore the cares of state. Mr. Lincoln did not seek the ruin or humiliation of those who crossed him, never

failing to display a magnanimity which has not always been emulated by his successors.

A federal income tax was imposed, and was deducted from the salaries of the federal judges. Taney wrote Mr. Chase, Secretary of the Treasury, pointing out the unconstitutionality of this action, but Mr. Chase made no reply.

Where quantities of drugs were seized by a federal provost marshal, and it was alleged they were intended for the Confederacy, Taney in 1863 at the circuit released them, and put the costs on the marshal.

"Death is a black camel, which kneels at the gates of all," says Abd el Kader. The end was near.

"Of no distemper, of no blast he died,

But fell like autumn fruit that mellowed long.

Even wondered at because he dropped no sooner."

(Dryden's Oedipus.)

On the 12th of October in his eighty-eighth year, he died, and was buried as he wished beside his mother in the burying ground of the little Roman Catholic Chapel at Frederick City, where, during the long years of his residence, he knelt in prayer every morning in storm or sunshine.

Of all the many estimates of his services and his powers printed at his death, that of his judicial associate for six years, his chief opponent in the Dred Scott decision, Benjamin R. Curtis, is perhaps the most just and discriminating. I gather largely from that that Mr. Taney was a man of fragile body, sustained by rigid care and a will of iron, and a temper of steady disciplined cheerfulness. He displayed mental faculties which did not fail to the end, a memory to the last alert, copious and accurate, which held the volumes and pages of citations and names of persons, as well as facts and principles, with wonderful accuracy and detail. Even to the end of a greatly protracted life, he showed none of the querulousness of age, and though of a vehement nature had it always in subjection. He was considerate to all high and low, even to his old negro servants, or to a little colored girl whom he saw vainly trying to fill a bucket at a pump. He filled it for her as he passed, and spoke kind words to her.

When he was appointed he was by many in other parts of this country thought "Neither a learned nor a profound lawyer," but he proved a master of the jurisprudence which belongs to the federal courts. He had great and dangerous powers of subtle

analysis, but balanced by common sense and wide experience. His physical feebleness limited his research and the number of opinions which he wrote, but in the consultation room his "dignity, his love of order, his gentleness, his caution, his accuracy, his discrimination," were of incalculable importance. The courtesy, unflinching attention, firmness, promptness and precision he displayed upon the bench were remembered by all, and by an absolute familiarity with practice, he accelerated the dispatch of business. He was very free from vanity, or conceit, traits which I am told sometimes invade even the judicial bench, and readily left to his associates the preparation of opinions in notable cases which they desired. His style was markedly clear and pure. Judge Curtis said at his death that it is one of the favors "which the Providence of God has bestowed on our once happy country, that for the period of sixty-three years this great office (the Chief Justiceship) has been filled by only two persons, each of whom has retained to extreme old age his great and unusual qualities and powers. The stability, uniformity and completeness of our national jurisprudence are in no small degree attributable to this fact. The last of them has now gone. God grant that there may be found a successor true to the Constitution, able to expound and willing to apply it to the portentous questions which the passions of man have made."

That successor was Mr. Chase of Ohio, the Secretary of the Treasury, who had ignored the Chief Justice's letter of protest as to the tax upon the judges' salaries. Mr. Chase's political ambitions and embroilments, his personal presence more imposing than his mental equipment, and presently his impaired health, limited the impression possible for him to make upon the jurisprudence of this country. He was succeeded in turn by Mr. Waite of Ohio, who came to the great office by service before the Geneva Commission on the Alabama Claims, after the name of Mr. Reverdy Johnson which had been placed in nomination by President Grant, had been withdrawn, on account of opposition due to a friendly letter which it transpired he had written to his old cabinet colleague, Mr. Jefferson Davis, at the opening of the war.²

Mr. Waite's comparatively obscure term was succeeded by that of Mr. Fuller of Chicago, the present accomplished Chief Justice, whom God Preserve.

It would be unjust to close this imperfect sketch of a great

² Sec. 7 Richardson, Messages and Papers 259, cited Scott's Cases Inter. Law, p. 541 note.

judicial character in which his opinions so hostile to the rights of the negro are mentioned, without adding that as his biographer records:

"In early life he manumitted all the slaves he inherited from his father. The old ones he supported by monthly allowances of money till they died. The allowances were always in small silver pieces—not exceeding fifty cents—as more convenient and not so liable to be taken improperly by those with whom they might deal. Each servant had a separate wallet for their allowance, which was brought monthly to the member of the Chief Justice's family who attended to the matter." This too when the salary of the Chief Justice was small and his modest fortune had been lost by unwise investment. It fairly illustrates the minute and faithful kindness of the man.

In the forty-four years since his death, it is to be feared that the Constitution which he revered has been construed into such meanings as he could never have found in its four corners, and that the state rights which he cherished are almost as extinct as the negro slavery which he upheld by his decisions, yet mitigated by his kindness. But the Constitution so often despaired of yet stands and lives like the bark of a tree, not by rigorously confining, but by imperceptibly and naturally growing and expanding with the life which it shelters but cannot restrain.

I shall be grateful if I have been able to make Marshall's successor live again in your minds, a great judge, a good man, whose views we do not by any means all share, but whose abilities we admire and whose character we revere. May the green turf of Maryland which he loved lie lightly above the dust of Chief Justice Taney, as he sleeps by his mother behind the little chapel where he and she worshipped according to their faith. May those who succeed him emulate his dignity, purity and learning, his zeal for justice, his kindness and unfailing consideration, and may they learn from the fate of many of the views he so earnestly supported that the whole fabric and processes of life and government are no more stationary than the globe on which we stand. That they move on under a process of development as inevitable and all controlling as that observed in organic life. Those minds are fortunate which are shaped by sympathy with the future instead of agreement with a vanishing past. Continuity must not be lost, but stagnation is as fatal to law as to morals.

Logic and learning and love of precedent alone make neither Judge nor Lawyer immortal. He must help to bring the great

ship to "the haven where she would be," He must be alive to that spirit epitomized in the word adopted by this State as its motto, "Forward" which our New England poet felt when he sang

"Far off I hear the crowing of the cocks,
And through the opening door which time unlocks
Feel the fresh breathing of Tomorrow creep."

Though "the ivy of remembrance and the laurel of renown" still wreathes his memory and crown his honored dust, we miss this one noble attribute of greatness in the eminent character we have considered.

And there are those who would charge this fault upon our whole profession.

Voltaire called Lawyers the Conservers of old abuses and many of them have deserved his bold and bitter taunt, but a profession which gave to England Somers and Camden, Bentham, Brougham and Romilly, which gave to our own dear country Otis, Patrick Henry, Jefferson, author of the Declaration of Independence and the Statute of Religious Liberty of Virginia, Seward, Sumner and Abraham Lincoln, author of the Emancipation Proclamation, need not blush for its share in the battle for freedom and for right.

Society has sloughed off and discarded worn out barbarisms through the courts ten times where it has done so once through the legislature, ten times by decisions, the work of Lawyers on the bench and at the bar to once by statute, and yet in addition almost every statutory reform has been lead by lawyers.

Who leads for reform in this good State of Wisconsin? A Wisconsin Lawyer. Who leads for reform in my own State of Iowa? An Iowa Lawyer.

Who is the President of France, the great Republic of Europe, today? A French Lawyer. Who is the liberal and almost radical Prime Minister of England? Mr. Asquith, the most advanced premier in a century, and the first Lawyer appointed to that great office in ninety-nine years. Who is put forward to carry the banner of reform by the party at present in power, and who seems destined to carry the banner of reform of the great rival of that party in the present presidential campaign? In each case an American Lawyer.

D'Aguesseau called the Advocates of France, "An order as old as the magistracy, as noble as virtue, as necessary as Justice." We need fear no man's challenge when we say the same of the Bar of America.

Charles Noble Gregory.